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No. 81-5152

In the Supreme Court of the United States

OCTOBER TERM, 1981

OMAR TAYLOR

Petitioner,

v.

STATE OF ALABAMA

Respondent,

ON THE WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED JULY 27, 1981.
CERTIORARI GRANTED NOVEMBER 2, 1981.

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RELEVANT DOCKET ENTRIES

1.	Judgment and sentence of Trial Court	5/17/79
2.	Notice of Appeal	5/22/79
3.	Record filed	11/21/79
4.	Ruling of the Alabama Court of Criminal Appeals	5/27/80
5.	Ruling of Supreme Court of Alabama	2/27/81
6.	Application for rehearing in Supreme Court of Alabama denied	4/10/81
7.	Stay of Judgement granted for 60 days from 4/21/81 for filing of petition for Writ of Certiorari in the United States Supreme Court	5/11/81
8.	Petition filed	7/27/81
9.	Petition granted by U.S. Supreme Court	11/2/81

CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

TESTIMONY OF R. D. MOBLEY AT SUPPRESSION HEARING

(Trial Transcription, p. 3-16)

(Bracketed page references are to trial transcript pages 3-16)

[3] (The Witness, after having first been duly sworn to tell the truth, the whold truth, and nothing but the truth, took the stand and testified as follows:)

BY MR. BENTLEY:

Q. State your name, please.
A. Rickey Mobley.
Q. How are you employed?
A. Montgomery Police Department; Robbery—Homicide/
Q. How long have you been a policeman?
A. Eight years.
Q. How long have you been a Detective?
A. Since 1975.
Q. How long with Robbery-Homicide?
A. Three Years.
Q. Would that include last December?
A. Yes, sir.
Q. Would it include this January?
A. Yes, sir.
Q. Now, did you play a role in the investigation of the robbery of Moseley's grocery, which occurred on December second of last year?
A. Yes, sir.

[4] Q. Were you the lead detective in the case?
A. The case was originally assigned to me and Hicks, but it was later assigned to Wilson and Duncan.
Q. What role did you play in the arrest of Omar Taylor?
A. I was not present the day he was arrested.

Q. What role did you play in his being interviewed about the robbery?

A. Okay. On . . .

Q. On that day that it happened.

A. On the day that he was arrested?

Q. Yes.

A. I was not there the day that he was arrested, now. I came up with some information on him prior to . . .

Q. On the day that he was arrested and questioned, you did not have anything to do with that?

A. No, sir. I was off that day.

Q. Now, Directing your attention to another case which involves a Charles lee Martin ALIAS Charles Williams, did you have an occasion to talk to that subject?

A. Yes, sir. I did.

Q. Where was he when you talked to him?

A. At the Montgomery Police Department.

Q. Was he in the jail?

A. He was in the interview room in the Detective's offices.

Q. Was he under apprehension for any type of offense?

[5] A. Yes, sir. Charge of rape and robbery.

Q. and, specifically, what was the nature of the charges he was charged with?

A. Charged with the robbery and rape of a lady that runs a store at Mobile and Mildred Street. I don't remember her name nor the name of the business.

Q. To refresh your recollection, Discount Clothing Store, Era Jo Barnes.

A. Yes.

Q. And was Charles Lee Martin ALIAS Charles Lee Williams in custody for that offense which occurred on 12/13/78?

A. Yes, sir.

Q. Did you talk with Charles Lee Martin?

A. Yes, sir, I did.

Q. Did you have to force—Did he give you the information about the robbery we are here for today at Moseley's Grocery?

A. Yes, sir.

Mr. Beno: I am going tp object to what anybody else said who is not a party here today.

The Court: Overruled.

Q. Did you threaten Martin to get him to talk to you?

A. No, sir.

Q. And, the information that he gave you, was that voluntary information from him?

A. Yes, sir.

[6] The Court: Are you setting up probable cause for arrest?

Mr. Bentley: Well, the basis for the arrest of the Defendant here . . .

The Court: Yes, that is what I mean.

Mr. Bentley: Yes, sir.

The Court: And you are using hearsay for probable cause purposes.

Mr. Bentley: That would be the basis of the arrest of Omar Taylor.

The Court: All right. Go ahead.

Q. What did Charles Martin say to you?

A. He said that he had heard that Omar Taylor was involved in the robbery of Moseley's Grocery. What part he took, he doesn't know.

Mr. Beno: Objection. This isn't direct hearsay. This is double hearsay. This is hearsay on hearsay, unless he can say that this Defendant or this person you are speaking of present and had personal knowledge . . .

The Court: Hearsay will support a finding of probable cause, but the informer must be creditable and the basis for believing him must be creditable and the basis for believing him must be creditable shown.

The Court: I think we have to establish both of those.

Mr. Bentley: I am going to elicit from this Detective here some information that this particular Defendant told him. Now, it is my position that while the information that Williams, ALIAS Martin, gave to Detective Mobley might not amount to probable cause, I have cases here I would like to present to the Court at a latter time that show that even if the Court finds that to be the case, any subsequent questioning would still be proper.

[7] The Court: Ask him a question and let's see.

Mr. Bentley: I think there was an objection.

The Court: Ask him a question.

Q. What did Charles Martin say to you about Omar Taylor?

A. He said he had heard that Omar Taylor . . .

Mr. Beno: I will submit an objection to what he had heard.

The Court: I sustain as far as what he was told that somebody else heard. I think that is going to far.

Mr. Bentley: May I speak to that, Your Honor?

The Court: Yes.

Mr. Bentley: I have the case authority—it is not my position that Charles Martin gave this Detective information which amounted to the probable cause. That is not my position. I think the court is entitled to know what the basis was the later arrest of Omar Taylor by another Detective who was out here. Now, if the court finds that it doesn't amount to probable cause, I want the court to make a ruling accordingly. I think the objection Mr. Beno was making goes to the weight of it and whether or not it goes to a valid basis to arrest him rather than to admissibility . . .

[8] The Court: Let me see the case you are talking about.

Mr. Bentley: I have McElroy which says that even if an individual is illegally detained, such detention itself doesn't render a confession obtained during such questioning involuntary and inadmissible. Page 438, Section

200A, I have state versus Johnny Ray Parker, which says a confession is not inadmissible solely because of illegal detention of the accused.

The Court: These questions, it looks to me, you are trying to establish he was legally detained.

Mr. Bentley: Sorry.

The Court: There questions, you are trying to establish that the arrest of Taylor was with probable cause.

Mr. Bentley: Well, sir, I want the Court to know.

The Court: Even if not, that does not throw the confession out. I understand what you are saying.

Mr. Bentley: Right. And I want the court to know everything Martin told the Detective whether hearsay, double hearsay. And make his own judgement as to the basis that it gives them to later pick up Omar Taylor. [9] The Court: You say that probable cause can be based on hearsay. And I agree with you, if the fellow doing the talking is shown to be reasonably creditable or some other reason to attach some creditability or believability to his testimony. Not only on Martin, but the Courts needs some predicate laid on where the fellow that Martin heard it from.

Mr. Bentley: I am not able to lay that predicate.

The Court: Then, I am going to sustain his objection. If that was not true and you could get somebody—X could say that he heard something from Y and Y could be totally irresponsible. Under Agular and Spinilli, I think you have to have some believability. I realize it is not the test of admissibility, but there has to be some reliability in it. And if you show me some reason that Martin had to believe X over here, whoever that was, or some reason that you can show this Court that X was Creditable, I will listen. But until you do that, I sustain his objection.

Mr. Bentley: If my purpose was to show the Court that Martin gave—who incidentally is a Defendant is Cases 248 and 149 which is pending for trial before this Court in April for Rape and Robbery charges—if it

were my purpose in saying that this was a probable cause intention of Mr. Taylor when he was picked up on January 4, then, I think the Court's position would be well founded. But to go a little further, I have a line of cases out of New York which are before the U.S. Supreme Court which recognize the right of the police to arrest individuals on what the New York Court has labeled as reasonable suspicion to a Terry versus Ohio stop and frisk situation which admittedly in the language of these cases is less than probable cause.

The Court: All right. I agree with that. Let's move along.

[10] Mr. Bentley: May I ask him that question.

The Court: You can ask him whatever you want to, but unless you establish some type of creditability on this, whoever Martin heard it from, the Court is going to sustain his objection.

Q. Well, let me ask you this, Detective Mobley: You did talk to Martin?

A. Yes, sir.

Q. And did he give you some information?

A. Yes, sir.

Q. And without going into what the information is, what did you do with that information?

A. I gave this information to Detective Wilson and Duncan and the other members of our robbery team.

Q. And would that include Detective Ed Alford?

A. Yes, sir. He is a Sergeant and at that time was over robbery.

[11] Q. Let's omit that, if anything, Martin told you. Did you receive any other information about Omar Taylor and whether or not he played any role in the robbery of Moseley's Grocery, which is what we are here today for?

A. No, sir, he did not.

Q. So, everything you know about Omar Taylor, this Martin character told you?

A. Yes, sir.

Q. And when was Martin arrested?

A. December 22—it would have been 1978—nryerrn eight and nine a.m. Early that morning.

Q. December 22?

A. Yes, sir.

Q. And I think the testimony in this will show with too much question that Omar Taylor was arrested on January 4. That would be a time span of approximately two weeks?

A. Yes, sir.

Q. Now, within that two-week time span, do you remember when it was you talked to Martin?

A. No, sir. He was talked with on several occasions.

Q. When you got this information from him?

A. Yes, sir. From the time Martin was arrested to the time Taylor was arrested—it would only be a guess —I would say probably within the first week after his arrest. We generally talk to Robbery suspects on numerous occasuins during the first week they are detained. Usually, after they are in jail a few weeks, they want to talk to us or call for us, or we will go back and talk to them.

Q. How did you come to talk to Martin on this particular occasion?

A. We had gotten him out of jail and was talking to him.

[12] Q. What was your purpose of talking to him?

A. To see if there was information that he would like to give us concerning other robberies. We had had several robberies in this same neighborhood. And we felt . . .

Mr. Beno: Your Honor, I am going to object. This has nothing to do with what we are here today for And I am going to object to any superfluous testimony which does not lead us in the direction for which this hearing is laid or predicted.

The Court: If it is irrelevant, the Court is not going to pay any attention to it. But I do not know whether it is relevant or not, so let's see.

Q. What was your purpose in talking to Martin?

A. We had had several robberies in the same neighborhood where the robbery that we had arrested him on. And we felt that either he was involved in some of the robberies or might know who was and might be able to help us on it.

Q. Did he share with you some of his information on other robberies as well?

A. Yes, sir, he did.

Q. Did you ask him about the Moseley's Grocery robbery?

A. Yes, sir.

Q. And is that the robbery that Omar Taylor has been indicted for?

A. Yes, sir.

Q. Now, did he give you some information on that robbery?

A. Yes, sir, he did.

Q. And did that information include statements about Omar Taylor?

[13] A. Yes, sir.

Mr. Beno: Objection unless he can show there is some . . .

Mr. Bentley: I did not ask him what the statement was. I just asked if the statement which he gave included information about Omar Taylor.

Mr. Beno: I withdraw the objection.

Q. Did they?

A. Yes, sir.

Q. And did he mention the names of anybody else?

A. No, sir.

CROSS-EXAMINATION

BY MR. BENO:

Q. Detective Mobley, speaking of creditability, now, you are not going to tell this Court that you feel that Charles Williams Martin is a creditable person, are you?

A. I do not know him that well. I know I arrested him. He has never given me . . .

Q. Would you believe the Defendant . . .

Mr. Bentley: Wait a minute. He cut him off.

A. He has never given me any information before, so I do not know.

Q. Never given you any information previous to this occasion?

A. No, sir.

Q. All right. Would you believe him under oath?

Mr. Bentley: Objection. What kind of question is that?

The Court: I will let him answer it, if he can.

A. In this instance, yes, sir, I did.

Q. What I am saying is would you believe him under oath based on what you know about the Defendant in this case?

A. It would depend on what he was talking about.

Q. But in fact in this case, any information you may have obtained wasn't of the personal knowledge of Mr. Martin?

A. He didn't tell me how he got it. I don't know how he got it.

[14] The Court: hy did you believe in this instance?

The Witness: Because he said that he knew that this guy was involved in a robbery and he was convincing to me. You know, you just have to be there to talk to him.

The Court: What is the basis for your believing this testimony?

The Witness: After having him in jail for several days and talking to him every day or every other day or two, you develop a certain rapport with these people.

The Court: Did he have anything to gain by telling you a falsehood?

The Witness: No, sir. Naturally he wanted us to help him and tell him that we would get him probation and this kind of thing. But I told him I couldn't; that it wasn't in my power; that the only thing I could do for him would be if he cooperated with us, if he helped us clear any other criminal activity, that he would make

this information known to the Court, and what the Court done with it, you know, it would be out of my hands.

The Court: Did you impress upon him the consequences of him telling you a falsehood?

A. Yes, sir. I rold him I did not want any false information causing me to be picking up a lot of wrong people or investigative work unnecessarily.

Q. So, What you are saying, then, based on what he told you, he had no way of knowing other than what he had heard from someone involved in this robbery? In other words, he had to believe his source in order to give you the information he had?

[15] A. Yes, sir, as far as I know. I don't know how he knew. I don't know if he was a party of the robbery hisself. He was a suspect to me at that time.

Mr. Beno: No other questions.

REDIRECT EXAMINATION

[16] BY MR. BENO:

Q. Was there any other than your personal suspicion and based on your conversation with him previously, was there any reason or foundation for which you could believe the Defendant? Were there any—did he give you any places where you may be able to find the money or find any of the weapons or any other element which might give credibility to his statements?

A. No, sir. He didn't say anything else other than the fact that he knew that Omar Taylor was involved in the robbery. He didn't know about where the money, gun, or anything else was.

(At this time the witness was excused and released.)

CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

DEFENDANT'S TESTIMONY AT SUPPRESSION HEARING

(Trial Transcript, p. 47-57)

[47] Q. Once you had signed that—that is, in fact, the second time you had been questioned about this; is that correct? You were questioned in the car?

A. Yes, sir.

Q. And, now you are questioned in the police station?

A. Yes, sir.

Q. And this is the first rights form; is that correct?

A. Yes, sir.

Q. Now, after you had signed that, did you, in fact, get an attorney at that time?

A. No, sir.

Q. What, if any, questions were asked of you at that time after they had you sign the rights form?

A. They asked me did I know where Moseley's Grocery Store was located at. And I told them no. And then it was another fellow, sort of stout fellow with black hair, and he said, "You mean to tell me you do not know where it is located at and you live around here?" And I said, "No. I don't know where it is located at." And, so he said, "Well, we know you robbed the place, because your friend told us you robbed it." And I told them, "I did not rob anything." And, so they said they were going to take me downstairs and put me in a lineup.

[48] Q. Did they threaten you in any way during the interrogation?

A. The heavy-set one with black hair, he threatened to drive my head through the wall.

Q. If I did not stop beating around the bush.

Q. Okay. And how long was it that you were questioned during this period of time?

A. About fifteen, twenty minutes.

Q. When you were taken from questioning, where were you taken to?

A. They took me down into the jail part and I changed my clothes and they put me in a lineup—No. They fingerprinted me first.

Q. And then they put you in a lineup?

A. Yes, sir.

Q. How long did it take for the lineup, if you recall, approximately?

A. A little over—about an hour, I guess.

Q. Now, were you allowed to speak with your attorney at any time that you had previously requested?

A. No, sir.

Q. When you returned from the lineup, what, if anything, unusual happened?

A. When I got out of the lineup they told me to put my clothes back on and I changed from the jail clothes and I put my clothes back on. And they put me in a little cell.

[49] Q. Were you alone?

A. Yes, sir.

Q. How long were you there before they spoke with you again?

A. About ten minutes. Two Detectives came and got me.

Q. And where did they take you at that point?

A. Back upstairs into an office.

Q. And who was present at that time? Were any of the officers present here on Tuesday present at that time?

A. Yes, sir.

Q. What happened then?

A. So, when they took me in the office, one of the Detectives told me that I lied. He said that the lab—the fingerprint expert said that my prings was on the merchandise inside the store. So, he said, "You robbed that place." And I said, "I did not rob anything." So, at that time, another Detective came in and he had a photo . . .

The Court: Had a what?

The Witness: He had a picture.

Q. Are you talking about a picture?

A. A picture.

Q. Okay. What happened then?

A. They took the picture and they looked at me and kept looking at the picture. And he said he resembles the man. And so that is when they called another Detective in there, and they took three pictures of me. And they questioned me a little more about the robbery. And I kept telling them, "I do not know nothing about the robbery." So, one of the officers, the officer who was here the other day, said, "We understand, you are under arrest as of now for armed robbery." And he said, "Your bail is twenty-five thousand dollars." And he took me downstairs.

[50] Q. At that time did you finally have the rights form presented to you again—Oh, was there any conversation about an attorney at this questioning?

A. I asked for an attorney at that time, too. I asked them when did I get a chance to see a Lawyer, and they told me—all they said was you could get one. You will see one.

Q. And finally, you had another meeting with the Detective that evening; is that correct?

A. Yes, sir.

Q. And what happened at that time?

A. That evening, the Detective—the two young Detectives who was in here the other day, they came down and got me that evening. And they took me upstairs. And, when I came upstairs, my girlfriend and two of my neighbors was out there. So, he told me that—He said "I came down to get you because your girlfirend wants to talk to you." He had took me in the room. It was me, him, and the other Detective. So, he said, "We usually don't do this, but I am going to let you talk to your girlfriend." And he gave me a pack of cigarettes and a letter. I got the letter upstairs now. He gave me a letter

and a pack of cigarettes, a letter she had wrote and a pack of cirgarettes that she had brought for me. And he was telling me about I don't understand you know. A guy like you, have a nice girlfriend like that usually don' come down here like this, you know and be following up on somebody. So, then he said, "I want to ask you a couple of questions about the robbery." So, he asked me did I rob the place; did I want to make a statement or anything. And I told him no. I told him I had all ready told them that I didn't rob it. So, at that time, one of the Detectives brought this brother inside that I had knew. So he-a brother named Charles Williams lives on Cobb Street. He told—he said—he said, "You know this gur right here?" and I said, "Yeah, I know him." And he said, "How well do you know him?" And I said, "I know him real good." And he said, "Do you know him well enough to trust him?" said, "Yeah, I trust him.: And he said, "Well, me and Charles been knowing each other for a long time." He said, "Charles been doing me favors."

[51] Q. Who said that?

A. Detective Hicks. And Charles said, "Yeah, he do me favors." And so anyway, he said, "What I am saying is you ain't in no trouble." You know. He said, "We know that you was there because we have your fingerprints." You know. He said that I wasn't picked out of no lineup, but they want to know who else was in there with me when I was in there. So, I told them that . . .

Q. That's okay. Do not tell us who you told them unless you put it on the statement.

[52] A. Right. Well, at that time I told them I didn't know anything about it. so, he asked me a couple of more questions, you know.

Q. Had you signed the next rights form yet?

A. No, I didn't sign the last rights form, you know until after the statement.

Q. Okay. Go ahead.

A. So, he kept questioning me for a little while and said I am going to let your girlfriend come in and talk

to you. And, so he had me and my girlfirend and Charles —Charles Williams. He still was in the room. And he was telling them that I was facing anywhere from ten years to life, you know, but it wasn't as serious as it looked or as it seemed, you know; that I could help myself if I took and come across, you know, and be truthful with them. And he said that if I signed a statement, that he knew the judge and that he would talk to the judge, and it is a possibility that he could get me a suspended sentence probation. And then at that time my girlfriend, she got to crying and upset. And he said, "Well, I will leave ya'll in the room for a while, and ya'll could talk. And I will be back. And he went out and left us in there for about ten minutes.

Q. Then he came back in after you had an opportunity to speak with your girlfriend?

A. Right.

[53] Q. And at that time, did he give you a rights form?

A. No, I never signed—let;s see. If I am not mistaken I signed the rights form right before he took the statement or either after. I have forgotten.

Q. But at that time, he took the statement from you, right?

A. Yes, sir.

Q. Omar, have you eve been convicted of an felonies before?

A. No, sir.

Q. Do you have a criminal record?

A. No, sir.

Mr. Beno: I have no more questions, Your Honor.

CROSS-EXAMINATION

BY MR. BENTLEY:

Q. Up until now did you know who Detective Hicks is?

A. Yes, sir.

Q. He was the one that was there when you signed the statement.

A. Yes, sir.

Q. Did you admit to anybody else that you did the robbery before you talked to Detective Hicks?

A. No, sir.

Q. He was the first one?

A. Yes, sir.

Q. And one of these Detectives got you a Lawyer?

A. No, sir.

Q. And you wanted a Lawyer before they asked you?

A. Yes sir.

Q. But you answered their questions even without a Lawyer?

A. Yes, sir.

[54] Q. Did any Detective ever beat you or hit you or strike you?

A. No.

Q. Had you been drinking?

A. No.

Q. Were you sober?

A. Yes, sir.

Q. Had you had any drugs at all?

A. No.

Q. Did you understand your rights:

A. I was understanding that I would have a Lawyer.

Q. No. Do you remember them reading you your rights?

A. Yes.

Q. Did you understand those rights that they read to you?

A. I had my own understanding of them.

Q. Did you understand . . .

Mr. Beno: He can explain how he understood his rights.

The Court: You can do that. Go ahead.

Q. What did you understand?

A. I was understanding that I signed the form that I would be given an opportunity to speak with a Lawyer.

Q. Why did you feel that way?

A. Because I asked the Detective that and he said I would.

Q. Which one?

A. It was kind of the stout one with blond hair.

Q. Is that the one that you gave the first rights form?

A. Yes.

[55] Q. All right. That is Detective Wilson. did you tell Detective Hicks that you wanted a Lawyer?

A. Yes, sir.

Q. What were the exact words?

A. I asked him when would I get a chance to get a Lawyer.

Q. And did you want a Lawyer before he questioned you?

A. Yes, sir.

Q. But you answered his questions without a Lawyer present; is that correct?

A. Yes, sir.

Q. And, He gave you—he told you what your rights were, didn't he?

A. Yes, sir.

Q. You knew you didn't have to talk to them, didn't you?

A. Yes, sir.

Q. But, knowing that, you did talk to them, is that correct?

A. Right.

Q. And you knew that anything that you said to him could be used against you in Court?

A. Yes, sir.

Q. Did you sign the rights form before or after you signed the statement?

A. I can't really recall whether it was before or after.

Q. Well, if the rights form has 8:50 p.m. and the statement has 9:15 p.m., wouldn't that show that you signed the rights form before you signed the statement?

A. I signed it before.

[56] Q. Your testimony now is that you signed it before; is that correct?

A. Right. I can't—like the night I signed it, I don't remember whether it was before or after.

Q. Well, you knew your rights, didn't you?

A. Right.

Q. Now, if you wanted a Lawyer before you answered any of Detective Hick's questions, then, why did you go ahead and answer his questions without a lawyer when he asked you about the robbery?

A. Well, after he had brought my girlfriend in and he had brought my neighbor in there, and the way things had started going, I just got, you know, I was so upset. I got scared.

Q. What did the Detective do to scare you?

A. He didn't do nothing to me, you know, physically or nothing like that, you know.

Q. I want you to tell the judge anything the Detective did to make you afraid.

A. He didn't do nothing to make me afraid.

Q. You said you were upset and scared. What did the Detective do to get you upset?

A. He had my girlfriend upset.

Q. Well, they let you see your girlfriend, didn't they?

A. Right.

Q. And they told you they didn't usually do that.

[57] A. Right.

Q. But made a special case of letting you see your girlfriend.

A. Right.

Q. And they gave you cigarettes.

A. Yes, sir.

Q. And nobody ever hit you or beat you or anything like that.

A. No.

Mr. Bentley: Okay. I believe that;s all.

Mr. Beno: I owuld like to redirect, Your Honor.

The Court: Sure.

CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

DISCUSSION BETWEEN COURT AND COUNSEL IN REFERENCE TO DEFENDANT'S FINGERPRINTS BEING TAKEN AT TRIAL FOR EVIDENCE.

(Trial Transcript, p. 116-118)

[116] The Court: If one is in custody, it is, as far as I know, permissible to take his fingerprints.

Mr. Bentley: Yes, sir. But you cannot do it like they did in Davis.

The Court: Well, I think Davis said you cannot just throw out a dragnet and get in a bunce of folks and take their fingerprints. That may be what Davis said, but to clarify any confusion that the Court has resulting from—and I have not read Dinoisio yet, but I will.

(At this time, the Court reading.)

The Court: The Court, looking at the totality of circumstances, and I think those two grounds tie together, I think that the confession was voluntary. And I think that there were enough intervening factors between the arrest and the confession, so that is one part. Now, then you come along and you say you object to the fingerprints because of the illegal arrest and because of the language of Davis versus Mississippi. Now, what the Court, as I understand it, Mr. Bentley has requested or do you now request—you made a motion for fingerprints, but I think it may be first that the Defendant who is in custody pursuant to an indictment now . . .

[117] Mr. Bentley: Yes, sir, Judge. The reason I am not only doing that—I am renewing my offer of this right here for the specific reason that . . .

The Court: I am going to sustain his objection to that. I am going to note that the Defendant is now in custody pursuant to an indictment of the Grand Jury. And I

think you should request him, prior to making a motion, to submit to a fingerprint.

Mr. Bentley: I have made that request to his attorney, Your Honor, and his attorney declines.

The Court: All right. Now the Court then would—do you now make a motion to the Court?

Mr. Bentley: I move that the Court require him to submit to taking his fingerprints. And as far as any self-incrimination, I believe the Alabama case of Lindsey versus State 331 So. 2nd, 797, taking of a fingerprint after arrest without counsel does not violate one's fifth amend priviledege against self-incrimination or one's sixth amendment right to counsel; and the testimony of a fingerprint expert is admissible. That takes care of the fifth amendment.

The Court: So, I am going to grant your motion. And by that I am saying that the State is entitled to have the Defendant's fingerprings taken.

[118] I think your record is protected. If you want to protect it anymore, then—I cannot require that, but I might suggest, since you have protected your record, you and Mr. Bentley's might discuss, since you all ready have those prints, if there is any reason to go take the, again.

Mr. Bentley: The main reason we wanted to use these is we have photographic blowups of the prints.

The Court: You all discuss that. I have sustained the objection to that. If you want to take some additional ones, then we will have to do it.

Mr. Beno: Let me talk to my client.

(At this time the fingerprints of the Defendant, Omar Taylor, were taken out of the presence of the Jury or Court Reporter in the Deliberation room, and marked as state's mi,ber four. Subsequent thereto, the following was had and done of record, the Jury being present.?

CIRCUIT COURT OF MONTGOMERY COUNTY, ALAMABA

TESTIMONY OF V. H. HICKS AT TRIAL IN REFERENCE TO THE CONFESSION BY THE DEFENDANT

(Trial Transcription, p. 124-128)

[124] Q. Is that his signature in the witness block as the witness?

A. Yes, sir, it is.

Q. At any point during your interview with Omar Taylor, did he ever ask for a Lawyer?

A. No, sir. He did not.

Q. Did he ever tell you in any way that he did not want to be interviewed?

[125] A. No, sir. He didn't.

Q. And did he—what did you do to make sure he understood what his rights are?

A. He signed this rights form.

Q. Indicating that he fully understood his rights?

A. Yes, sir, He did.

Q. Did he ask you any questions about his rights?

A. No, sir, none at all.

Q. Did he appear to be under the influence of anything; such as alcohol or drugs or medicine or anything of that sort?

A. No, sir, didn't appear to be.

Q. Now, did you talk with him after that?

A. Yes, sir, I did.

Q. And did you ask him some questions and did he tell you some things about the robbery?

A. Yes, sir, he did. He gave me a typewritten statement in regard to the robbery.

Q. Now, throughout your entire interview with Mr. Taylor, did you ever force, threaten, or coerce him into talking to you?

A. No, sir, I did not.

Q. Did you or anyone else in your presence and to your knowledge hit him or strike him or use any type of

mental or physical force against him to persuade and coerce him to talk to you?

[126] No, sir, we didn't.

Q. Now, how does the typewritten statement come to be prepared?

A. It is—the Montgomery Police Department is typed at the top, the place, which the Detective's office, the date, and the time of the Statement of the Defendant's name and address. The statement is taken by myself and the subject that we are talking about, which is robbery of Moseley's Grocery.

Q. That is your heading?

A. Yes, sir.

Q. I mean, how does the statement fit into the interview?

A. Well, usually we talk to the suspect or Defendant, whichever, and ask him about the robbery. In this case he went on and told me about the robbery; told me what happened. And, then I go back and type each sentence. Just as he is telling me, I will type it out.

Q. And at the end of that, there is some specific questions and answers that you ask him and he answers?

A. Yes, sir.

Q. Now, State's exhibit six. is this statement that you prepared on the interview with Mr. Teylor?

A. Yes, sir, it is.

Q. And, after you finished with the statement, is he given an opportunity to review it for accuracy or make any changes?

[127] A. Yes, sir, he has an opportunity to read the entire statement and make any changes that he would like.

Q. Be more specific about what you did in this case.

A. As far as the interview?

Q. Well, as far as his getting to review the statement.

A. Okay. After I finished the statement, I signed it. And I told him, or asked him, to read it. I gave him the original and the othr two copies. And I ask him if he would, to read the statement. At this time, he took it and

he appeared to be reading it for some time. And he told me it was right. And at that time, he signed it.

Q. Did he suggest any changes to it?

A. No, sir.

Q. Okay. There is one place up here on five and six I want to ask you about. What is this marking here in red?

A. That was a typographical error I made and caught, which I put for 1-4-78, and it should be '79.

Q. And whose initials are that?

A. Omar Taylor. He initialed it.

Q. Okay. And this is Omar Taylor's signagure at the bottom of the statement?

A. Yes, sir, it is.

Q. And, also, at the bottom of page one here?

A. Yes, sir.

Q. Okay, Detective Hicks, if you will take the statement and tell the jury what Omar told you.

Mr. Beno: Prior to the statement being given, I would like to voir dire the Witness.

[128] Mr. Bentley: I would object to that. We have been all through that.

The Court: Go ahead. You are entitled to voir dire.

(At this time, an at-bar discussion, out of the hearing of the jury and the courtroom reporter. Subsequent thereto, the following was had and done of the record.

Mr. Beno: I would like to note on the record, I am objecting to the admission of any confession.

Mr. Bentley: I am asking him to read it.

Mr. Beno: Same as offering.

The Court: Are you offering the—State's exhibit six?

Mr. Bentley: I would offer that and number five as well, which is the rights form.

The Court: All right. They will be admitted over your objection.

(At this time, State's exhibits numbered five and six were received into evidence.)

THE STATE OF ALABAMA—
JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1979-80

OPINION—May 27, 1980

3 Div. 118

OMAR TAYLOR

v.

STATE

Appeal from the Montgomery Circuit Court

HARRIS, PRESIDING JUDGE

Appellant was convicted of robbery and the trial court sentenced him to thirty years in the penitentiary. At arraignment, in the presence of his counsel, he interposed a plea of not guilty and not guilty by reason of insanity. Appellant did not testify in the case in chief and he offered no evidence under his special plea of not guilty by reason of insanity.

Appellant filed a pretrial motion seeking to have his confession suppressed and his arrest declared illegal. A fully blown hearing was held on this motion and much testimony was taken. At the conclusion of the hearing the motion to suppress was overruled and denied.

On December 2, 1978, three black males entered Moseley's Grocery Store located at the intersection of West Jeff Davis Street and Cleveland Avenue at approximately 7:00 p.m. They had previously entered into an agreement to rob the store. There had been a number of robberies in this area of the city of Montgomery in recent weeks and the police officers had initiated an intensive manhunt in an effort to apprehend the robbers. They interviewed a number of suspects in the

course of which they learned that appellant might be involved in the robbery of Moseley's Grocery Store. According to one of the investigating officers the information that appellant might have been involved in the robbery came from a jail inmate who was a suspect in the same robbery Charles Martin was in custody charged with rape and robbery in an unrelated case.

At the suppression hearing Police Officer R. D. Mobley testified that he had numerous conversations with Martin in the course of which Martin told Mobley he had information that appellant was involved in the robbery of the Moseley Grocery Store. Mobley stated that Martin, "didn't tell me how he got it. I don't know how he got it. He did not go into any details or who told him or when or where he obtained the information, but only that he was involved in a robbery . . . He said that he had heard that Omar Taylor was involved in the robbery of Moseley's Grocery. What part he took, he doesn't know."

The trial court was concerned about the credibility and reliability of Mobley's informant and Officer Mobley was questioned along this line and replied, "I do not know him that well. I know I arrested him. He has never given me any information before, so I do not know."

From the record:

> "Q. So, what you are saying, then, based on what he told you, he had no way of knowing other than what he had heard from someone else whether or not the defendant (Taylor) may or may not have been involved in this robbery? In other words, he had to believe his source in order to give you the information he had.
>
> "A. Yes, sir, as far as I know. I don't know how he knew. I don't know if he was a party to the robbery his self. (sic) He was a suspect to me at that time . . . He did not go into any details or who told him or when or where he obtained the in-

formation, but only that he was involved in a robbery.

"Q. Was there anything other than your personal suspicion and based on your conversation with him previously, was there any reason or foundation for which you could believe the defendant (sic)? Were there any—did he give you any places where you may be able to find the money or find any of the weapons or any other element which might give credibility to his statements?

"A. No, sir. He didn't say anything else other than the fact that he knew that Omar Taylor was involved in the robbery. He didn't know where the money, gun or anything else was."

Officer Mobley did not arrest appellant. He referred the information which he had received from inmate Charles Martin to two other officers assigned to the Robbery and Homicide Division of the Montgomery Police Department. These two officers arrested appellant without a warrant on January 4, 1979, at approximately 3:00 p.m., as he emerged from a pool hall on Holt Street. The arrest was based solely on the information furnished them by Officer Mobley following his interview with Charles Martin as set forth above. Upon arresting appellant they informed him who they were and told him that he was being arrested in connection with the robbery that occurred at Moseley's Grocery and Meat Market. They searched him for weapons prior to putting him in the patrol car and transported him to the station house and surrendered him to other detectives for questioning. After appellant was placed in the patrol car one of the officers, from memory, recited to him his constitutional rights. One of the arresting officers, Sergeant Ed Alford, testified that the arrest was made on information furnished by other investigators in the Robbery Division who had interviewed Charles Martin. Acting on this information appellant

was arrested without a warrant as the officer felt that it was necessary to pick him up and check him out. He was asked if he felt the information was sufficient to arrest appellant and he replied, "Well, I did not know because I had never seen him." He was asked if there was any basis on which the credibility of Charles Martin could be established and he answered, "I did not attempt to establish any credibility on him." Officer Alford further stated that the arrestee was not asked if he understood the rights given him and he replied, "I did not ask him anything concerning his rights. I just advised him of his rights."

Mr. and Mrs. John Moseley were in the store on the night of December 2, 1978, when the robbery occurred. Mr. Moseley was at the cash register checking out customers and Mrs. Moseley was in the office near the back of the store when she observed two black men enter the store. One of the robbers entered the office and pulled a pistol on Mrs. Moseley and said, "This is a stick up. Give me all the money in the safe." She told him there was no money in the safe. He again demanded the money and she told him that the safe was old and was not in use any more. He grabbed her by the collar of her coat and forced her from the office and told her to go to the back of the store. As she was leaving the office she looked in the direction of the check-out register and saw her husband and an employee with their hands in the air and another black man pointing a pistol at them. Shortly thereafter she saw two black men exit the store.

Mr. Moseley testified that just before closing time a black man, approximately five feet, five inches tall, came to the check-out counter and placed on the counter a two pound bag of Domino sugar and a package of Zeigler hot dogs. He asked for some lighter flints and when Mr. Moseley turned back around the man was standing there pointing a pistol at him. Mr. Moseley was ordered to open the cash register and give him all the money. Mr. Moseley flipped open the register and the bandit got the

money himself. The amount was $600.00. The bandit then asked for his wallet and Mr. Moseley told him he did not have a wallet. With the pistol still pointed at Mr. Moseley the man again ordered him to produce his wallet. Mr. Moseley then reached in his back pocket and got his wallet which contained eight or nine hundred dollars in large bills and handed the wallet to the man. The man immediately ran from the store. The packages of sugar and hot dogs remained on the counter where the robber had placed them. Mr. Moseley then called the Police Department to report the robbery.

Mr. and Mrs. Moseley were unable to identify either one of the three black men engaged in the robbery at the lineup or in court. The officers were careful in picking up the packages of sugar and hot dogs to process them for latent fingerprints. The fingerprints turned out to be those of appellant and there is no contention to the contrary. The interrogating officers informed appellant that his fingerprints were found on the bags of sugar and hot dogs and he subsequently signed a waiver of rights form and executed a written confession. The proper predicates were laid and the waiver of counsel form as well as the signed confession were admitted into evidence.

Appellant does not question the voluntariness of his confession because it was shown without dispute that he was given the *Miranda* rights and warnings. It was also shown without dispute that no promises, threats, coercion, rewards or hopes thereof were made or held out to him to induce him to make and sign the confessions admitted into evidence. On the other hand appellant contends that he was illegally arrested without probable cause and without an arrest warrant and was involuntarily transported to the station house for interrogation which led to his confession. He urges this court to reverse his conviction on authority of the opinion of the Supreme Court of the United Satets in *Dunaway* v. *New York*, —— U.S. ——, 99 S.Ct. 2248 (1979). A careful reading of the opinion in *Dunaway, supra*, convinces us that it is controlling and

this case must be reversed and remanded. We are left with no other choice.

The facts in this case leading to the arrest and detention of appellant and the facts leading to the arrest and detention of Dunaway are basically indistinguishable. In both cases the information was supplied by a jail inmate awaiting trial on unrelated unsolved crimes but the information supplied was insufficient to obtain an arrest warrant. Nevertheless, other detectives were ordered to pick up the suspects and bring them in for questioning. In each case the suspects were picked up and transported to the station house and placed in an interrogation room where each was questioned by officers after being given the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602. Both waived counsel and eventually made statements that incriminated them in the crimes. Both filed motions to suppress the statements (and in *Dunaway* the sketches of the crime scene—and in appellant's case the fingerprints he left on the packages of sugar and hot dogs) which were denied and both were convicted.

In *Dunaway*, supra, the court held:

> "The central importance of the probable cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees cannot be compromised in this fashion. 'The requirement of probable cause has roots that are deep in our history.' . . . Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that 'common rumor or report, suspicion, or even "strong reason to suspect" was not adequate to support a warrant for arrest.' The familiar threshold standard of probable cause for Fourth Amendment seizures reflects the benefit of extensive experience accommodating the factors relevant to the 'reasonableness' requirement of the Fourth

Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule."

The court relied on some quotes from *Brown* v. *Illinois*, 42 U.S. 590, 95 S.Ct. 2254 and *Davis* v. *Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, and went on to say:

> "These passages from Davis and Brown reflect the conclusion that detention for custodial interrogation —regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest. We accordingly hold that the Rochester police violated the Fourth and Fourteenth Amendments when, without probable cause, they seized petitioner and transported him to the police station for interrogation."

But there is more:

> "There remains the question whether the connection between this unconstitutional police conduct and the incriminating statements and sketches obtained during petitioner's illegal detention was nevertheless sufficiently attenuated to permit the use at trial of the statements and sketches. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed.307 (1939); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920).
>
> "The New York courts have consistently held, and petitioner does not contest, that proper Miranda warnings were given and that his statements were 'voluntary' for purposes of the Fifth Amendment. But Brown v. Illinois, supra, settled that '[t]he exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth,'

422 U.S., at 601, 95 S.Ct., at 2260, and held therefore that 'Miranda warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation.' Ibid.

" 'If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. . . . Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving Miranda warnings.' Id., at 602, 95 S.Ct., at 2261.

"Consequently, although a confession after proper Miranda warnings may be found 'voluntary' for purposes of the Fifth Amendment, this type of 'voluntariness' is merely a 'threshold requirement' for Fourth Amendment analysis, 422 U.S., at 604, 95 S.Ct., at 2262. Indeed, if the Fifth Amendment has been violated, the Fourth Amendment issue would not have to be reached.

"Beyond this threshold requirement, Brown articulated a test designed to vindicate the 'distinct policies and interests of the Fourth Amendment.' Id., at 602, 95 S.Ct., at 2261. Following Wong Sun, the Court eschewed any per se or 'but for' rule, and identified the relevant inquiry as 'whether Brown's statements were obtained by exploitation of the illegality of his arrest,' id., at 600, 95 S.Ct., at 2260; see Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed. 441 (1963). Brown's focus on 'the causal connection between the illegality and the confession,' 422 U.S., at 603, 95 S.Ct. at 2261, reflected the two policies behind the use of the exclusionary

rule to effectuate the Fourth Amendment. When there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts.

"Brown identified several factors to be considered 'in determining whether the confession is obtained by exploitation of an illegal arrest[:] [t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and particularly, the purpose and flagrancy of the official misconduct . . . And the burden of showing admissibility rests, of course, on the prosecution.' Id., at 603-604, 95 S.Ct., at 2261-62. Examining the case before it, the Court readily concluded that the State had failed to sustain its burden of showing the confession was admissible. In the 'less than two hours' that elapsed between the arrest and the confession 'there was no intervening event of significance whatsoever.' Ibid. Furthermore, the arrest without probable cause had a 'quality of purposefulness' in that it was an 'expedition for evidence' admittedly undertaken 'in the hope that something might turn up.' Id., at 605, 95 S.Ct., at 2262.

"The situation in this case is virtually a replica of the situation in Brown. Petitioner was also admittedly seized without probable cause in the hope that something might turn up, and confessed without any intervening event of significance. Nevertheless, three members of the Appellate Division purported to distinguish Brown on the ground that the police did not threaten or abuse petitioner (presumably putting aside his illegal seizure and detention) and that the police conduct was 'highly protective of defendant's Fifth and Sixth Amendment rights.' 61 A.D.2d, at 303, 402 N.Y.S.2d, at 493. This betrays a lingering

> confusion between 'voluntariness' for purposes of the Fifth Amendment and the 'causal connection' test established in Brown. Satisfying the Fifth Amendment is only the 'threshold' condition of the Fourth Amendment analysis required by Brown. No intervening events broke the connection between petitioner's illegal detention and his confession. To admit petitioner's confession in such a case would allow 'law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the 'procedural safeguards' of the Fifth.' "

If the situation in *Dunaway* is virtually a replica of the situation in *Brown*, as noted by the Supreme Court, then the situation in the instant case is a replica of both *Dunaway* and *Brown*.

Section 200.08 of McElroy's Alabama Evidence, Third Edition, Gamble, reads as follows:

> "It has been said that the irrefutable rule in this state is that even if an individual is illegally detained, such detention in itself does not render a confession, obtained during such detention, involuntary and inadmissible. This holds true whether the accused was arrested without pobable cause, without a warrant or whether he was detained beyond the time by which he should have been taken before a committing magistrate."

Eleven cases from this court and the Supreme Court of Alabama are cited in footnotes under the above quotation. Doubtless there are many more such cases since this Third Edition was published in 1977. For the Bench and Bar to rely on such cases in the future will be extremely dangerous in the light of *Dunaway* v. *New York*, supra. We are loath to reverse a case where the guilt of the accused is so clear and convincing and the guilt drips

from the fingers of both hands, but our path is lighted in *Dunaway* and we are bound to follow this path.

The judgment of conviction is reversed and remanded on authority of *Dunaway*, supra.

REVERSED AND REMANDED.

All the Judges concur, except DeCarlo, J., who dissents with opinion.

DeCarlo, J., dissents.

The United States Supreme Court in *Dunaway* v. *New York*, supra, reiterated the test laid down in *Brown* v. *Illinois*, supra, which articulates several factors that should be considered in determining the question; "[W]hether the connection between this unconstitutional police conduct and the incriminating statements and sketches obtained during petitioner's illegal detention was nevertheless sufficiently attenuated to permit the use at trial of the statements and sketches." Those factors are: (1) the temporal proximity of the arrest and the confession; (2) the presence of intervening circumstance; (3) and particulary, the purpose and flagrancy of the official misconduct.

The situation in the case involving the appellant, Omar Taylor, is distinguishable for that in the case of *Dunaway* v. *New York*, supra, because, in *Dunaway*, the accused made a statement within two hours after interrogation in the absence of an intervening circumstance which would have lessened the connection between his illegal detention and confession. In *Dunaway*, no "intervening circumstance" was present from the time the officers received the inmate's hearsay information, to the time *Dunaway* rendered incriminating statements and sketches.

In the case involving Omar Taylor, the officers, prior to receiving any information from the inmate, did have in their possession fingerprints taken from the bag of sugar and the hotdogs present at the time of the robbery.

Further, at the time the officers picked up Taylor, they had no other information from which an investigation could be commenced, other than the inmate's allegation. The officers could not, at that time, determine the authenticity of the inmate's statement concerning the appellant, Taylor, without a fingerprint comparison. Under these circumstances, it was reasonable for these officers to take Taylor into custody and to determine whether or not he was, in fact, the robber.

As the opinion reflects, prior to making any statement, Taylor was told by the interrogating officers that his fingerprints were found on the bag of sugar and on the bag of hotdogs, and it was after he had learned this information that he signed a waiver of rights form and executed a confession.

It was reasonable for the officers to investigate the information they had received because they were able to verify that information by comparison of fingerprints. The officers in Dunaway did not have an "intervening circumstance," fingerprint evidence for comparison, which lessened the connection between the alleged misconduct by the police and the confession of the defendant.

Therefore, in my judgment based on the foregoing facts, it can not be said that the officers in the present case were engaged in an "expedition for evidence." There existed in the case before us an intervening circumstance, that is, the fingerprint evidence. This "intervening circumstance" sufficiently attenuated any alleged unconstitutional conduct by the police so that the appellant's inculpatory statements were admissible.

For the foregoing reasons, I respectfully dissent.

THE STATE OF ALABAMA—
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1980-81

Ex-parte: State of Alabama, ex rel. Attorney General

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

79-732

(Re: OMAR TAYLOR

v.

STATE OF ALABAMA)

OPINION—February 27, 1981

TORBERT, CHIEF JUSTICE.

We granted certiorari to review the decision of the Court of Criminal Appeals in *Omar Taylor* v. *State*, [MS. May 27, 1980] —— So.2d —— (Ala. Crim. App. 1980), which reversed the trial court decision. The principal issue presented for our consideration is whether the trial court erred in admitting the fingerprints and confession of the defendant, Omar Taylor. We hold that the evidence was properly admitted, and we reverse the decision of the Court of Criminal Appeals.

At approximately 7:00 p.m. on December 2, 1978, two males entered and robbed Moseley's Grocery Store at the intersection of West Jeff Davis Street and Cleveland Avenue. There had been a number of robberies in this area of Montgomery in recent weeks, and the police initiated an intensive manhunt in an effort to apprehend the culprits. A number of suspects were interviewed, and during the course of the interviews it was learned that Appellant

might be involved in the robbery of Moseley's Grocery Store. According to one of the investigating officers, the information linking Appellant to the robbery came from a jail inmate, Charles Martin, who was himself a suspect in the same robbery. Martin was in custody, charged with rape and robbery in an unrelated case.

At a supression hearing, Police Officer R. D. Mobley testified that during numerous conversations with Martin, he told the officer he had information that Appellant was involved in the robbery of Moseley's Grocery Store. Mobley stated: "[Martin] didn't tell me how he got it. I don't know how he got it. . . . He did not go into any details or who told him or when or where he obtained the information, but only that he was involved in a robbery. . . . He said that he had heard that Omar Taylor [Appellant] was involved in the robbery of Moseley's Grocery. What part he took, he doesn't know."

Officer Mobley did not arrest Appellant. He referred the information which he had received from Martin to two other officers assigned to the Robbery-Homicide Division of the Montgomery Police Department, and these two officers arrested Appellant without a warrant on January 4, 1979. The arrest was based on the information furnished them by Officer Mobley following his interview with Martin.

Upon arresting Appellant, the officers informed him who they were and told him that he was being arrested in connection with the robbery of Moseley's Grocery. After Appellant was placed in the patrol car, one of the officers recited to him his constitutional rights, and, upon arriving at the station house, Appellant was surrendered to other detectives for questioning.

Sergeant Ed Alford, one of the arresting officers, testified that the arrest was made on information furnished by another investigator in the Robbery-Homicide Division who had interviewed informant Martin. Based on this information, Appellant was arrested without a warrant, as the officer felt it necessary to pick him up and check

him out. When asked if he felt his information was sufficient to arrest Appellant, he replied, "Well, I did not know because I had never seen him." Asked if there was any basis on which the credibility of Martin could be established, he answered, "I did not attempt to establish any credibility on him."

Mr. and Mrs. John Moseley were in their store on the night of December 2, 1978, when the robbery occurred. Mr. Moseley was at the cash register checking out customers and Mrs. Moseley was in the office near the back of the store when she observed two men come in. One of the men entered the office, pulled a pistol on Mrs. Moseley and said, "This is a stick up. Give me all the money in the safe." When she told him there was no money in the safe, he repeated the demand, whereupon she told him that the safe was old and was not in use. He grabbed her by her collar, forced her from the office, and told her to go to the back of the store. As she was leaving the office, she glanced in the direction of the check-out register and saw her husband and an employee with their hands in the air and another man pointing a pistol at them. Shortly thereafter, she saw two men exit the store.

Mr. Moseley testified that just before closing time a man, approximately five feet, five inches tall, came to the checkout counter with a two-pound bag of Domino sugar and a package of Zeigler hot dogs. He then asked for some lighter flints. Mr. Moseley turned away to get the flints, and when he turned back around, the man pointed a pistol at him and ordered him to open the cash register. Mr. Moseley flipped open the register, from which the bandit took $600.00. The bandit then demanded his wallet. Mr. Moseley told him he did not have a wallet. When the man again ordered him to produce his wallet, Mr. Moseley then reached in his back pocket and got his wallet which contained eight or nine hundred dollars. He handed the wallet to the robber. The man immediately ran from the store, but left the packages of sugar and

hot dogs on the counter. Mr. Moseley then called the police.

Mr. and Mrs. Moseley were unable to identify either of the men engaged in the robbery, either at a lineup or in court. Fingerprints on the sugar and weiners turned out to be those of Appellant. This fact was undisputed. The interrogating officers informed Appellant that his fingerprints were found on the bags of sugar and hot dogs. Subsequently, he signed a waiver of rights form and executed a written confession. The form and signed confession were later admitted into evidence.

Appellant does not question the voluntariness of his confession, as it was shown to have been given in compliance with *Miranda*. Additionally, no promises, threats, coercion, rewards or hopes thereof were made or held out to Appellant to induce him to make and sign the confession. Appellant contends, however, that he was illegally arrested without probable cause and without an arrest warrant, and was involuntarily transported to the station house for interrogation which thereafter led to his confession.

The United States Supreme Court, in *Brown* v. *Illinois*, 422 U.S. 590 (1975), held that the question of whether a confession has been purged of the taint of an illegal arrest under *Wong Sun* v. *United States*, 371 U.S. 471 (1963), "must be answered on the facts of each case." 422 U.S. at 603. We are of the opinion that the facts in the case before us fall somewhere between those surrounding the confession in *Wong Sun*, where the Court held that the connection between Wong Sun's unlawful arrest and his statement "had become so attenuated as to dissipate the taint," 371 U.S. at 491, quoting *Nardone* v. *United States*, 308 U.S. 338, 341 (1939), and those in *Dunaway* v. *New York*, 442 U.S. 200 (1979), *Brown* v. *Illinois*, 422 U.S. 590 (1975), and *Davis* v. *Mississippi*, 394 U.S. 721 (1969), where the Court held that the confessions were tainted by the unlawful arrests. We must therefore determine on which side of the line separating admissible

confessions from inadmissible ones the confession of Omar Taylor falls.

In *Dunaway*, the petitioner was arrested without probable cause in hopes that something would "turn up." 442 U.S. at 218. Less than an hour after he reached the police station, after being informed of his *Miranda* rights, he waived counsel and made the first of two statements and drew sketches that eventually incriminated him. 442 U.S. at 203. Between the time of Dunaway's arrest and that of his confession, "no intervening event of significance whatsoever" took place. 442 U.S. at 218.

Brown contained facts similar to those in *Dunaway*. Petitioner Brown was arrested without probable cause and made a statement shortly thereafter. The State of Illinois argued that the *Miranda* warnings were sufficient to attenuate the taint of the illegal arrest. The Court held that "[t]he *Miranda* warnings are an important factor . . . in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered." 422 U.S. at 603. Three additional factors were then set out by the Court to aid in determining whether the taint of an illegal arrest has been attenuated. They are: "[1] [t]he temporal proximity of the arrest and the confession, [2] the presence of intervening circumstances, and . . . [3] the purpose and flagrancy of the official misconduct." *Id.* at 603-04 (citations omitted).

In *Davis*, the police in Meridian, Mississippi, without warrants, picked up 24 Negro youths over a period of 10 days and took them to police headquarters, where they were questioned briefly, fingerprinted, and then released without being charged. 394 U.S. at 722. Davis was subsequently arrested, without a warrant and without probable cause, and fingerprinted again. The second set of fingerprints, along with the fingerprints of 23 others, was sent to the FBI for comparison with prints taken from the scene of the crime. *Id.* The FBI matched Davis's prints to those of the perpetrator of the crime, and he

was indicted. *Id.* at 723. The Court held that the fingerprints should be suppressed as the fruit of an illegal arrest. *Id.* at 728.

The Court held in *Wong Sun*, however, that where the defendant was lawfully arraigned and released on his own recognizance, and several days later voluntarily returned to the police station and made a statement, the taint had been attenuated. 371 U.S. at 491. On the other hand, statements made by Toy, another defendant in the case, at the time he was illegally arrested, and contraband seized during his arrest, were suppressible, since the statement did not result from "an intervening independent act of free will." *Id.* at 486.

While there admittedly has not been the same degree of attenuation here as in *Wong Sun*, neither is the statement as closely connected to the illegal arrest as in *Dunaway*, *Brown*, and *Davis*. Taylor had been under arrest for more than six hours when he made his statement. During that time he had been allowed to converse privately with his girlfriend and a male companion. He had been given his *Miranda* rights on three separate occasions. Additionally, subsequent to Taylor's arrest but prior to his confession, an arrest warrant was filed based on a comparison between his fingerprints and those found at the scene of the crime. In *Johnson* v. *Louisiana*, 406 U.S. 356 (1972), the Supreme Court held that where, prior to a lineup, the defendant was brought before a committing magistrate who advised him of his rights and set bail, the lineup was "sufficiently distinguishable to be purged of the primary taint." *Id.* at 365. Since a similar finding of probable cause separated the arrest and confession of Omar Taylor, it would seem that the taint has been purged here as it was in *Johnson*.

The exclusionary rule is especially harsh in situations such as this, where the motion to suppress involves a confession that is admittedly voluntary and where *Miranda* rights were given, not just once, but three times. The development of the rule reveals that it is a "judicially created means of effectuating the rights secured by the

Fourth Amendment," *Stone* v. *Powell*, 428 U.S. 465, 482 (1976), rather than a constitutionally required sanction. It is not coextensive with the fourth amendment. *Wolf* v. *Colorado*, 338 U.S. 25, 29 (1949).

The roots of the rule can be found in *Boyd* v. *United States*, 116 U.S. 616 (1886). In that case the Court held that the federal government could not subpoena incriminating documents from criminal defendants. 116 U.S. at 638. The Court stated:

> Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

Id. at 630.

Twenty-eight years later, in *Weeks* v. *United States*, 232 U.S. 383 (1914), the Supreme Court made a definitive ruling that evidence seized by federal agents in violation of the fourth amendment was inadmissible in federal court. If evidence may be seized illegally and placed into evidence, the Court held, the fourth amendment "might as well be stricken from the Constitution." *Id.* at 393. At that time, however, the fourth amendment was not thought to be applicable to the states. *Id.* at 398.

Silverthorne Lumber Co. v. *United States*, 251 U.S. 385 (1920), went one step further than *Weeks* and *Boyd*. In *Silverthorne*, the Court held not only that evidence illegally seized must be excluded in federal court, but also that a prosecutor may not admit copies of the evidence made while it was unlawfully in his possession, nor may knowledge gained from the unlawfully seized evidence be the basis of a search warrant. *Id.* at 392. The evidence, however, did not become "sacred and inaccessible," but could be obtained "[i]f knowledge of [it] is gained from

an independent source." *Id.* The Court stated that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Id.*

The Court held for the first time, in *Wolf* v. *Colorado*, 338 U.S. 25 (1949), that the fourth amendment applies to the states. There the Court said that "[t]he security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society." *Id.* at 27. The Court further stated that the fourth amendment is "implicit in the concept of ordered liberty," and therefore is "enforceable against the States through the Due Process Clause." *Id.* at 27-28. The Court declined, however, to apply the exclusionary rule to the states, holding that "the ways of enforcing such a basic right raise questions of a different order," *Id.* at 28, and that "it is not for this Court to condemn as falling below the minimum standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective." *Id.* at 31.

The *Wolf* holding was reinforced in *Irvine* v. *California*, 347 U.S. 128 (1954), but the Court indicated there that violation of an individual's fourth amendment rights by state officials might constitute a crime under federal statutory law. *Id.* at 137. Mr. Justice Jackson, writing for a plurality, directed the Clerk of the Supreme Court to "forward a copy of the record in this case, together with a copy of this opinion, for attention of the Attorney General of the United States." *Id.* at 138. However, two of the four Justices making up the plurality did not join in this directive. *Id.*

In *Rea* v. *United States*, 350 U.S. 214 (1956), an injunction was sought against a federal agent who proposed to testify in state court as to evidence gained through an illegal search and seizure. *Id.* at 216. The Court directed that the injunction be granted, basing its ruling on its "supervisory powers over federal law enforcement agen-

cies." *Id.* at 217. The exclusionary rule, however, was still not made applicable to the states.

The so-called "silver platter doctrine" was overruled in *Elkins* v. *United States*, 364 U.S. 206 (1960). Although federal agents could not use evidence they themselves had seized unlawfully, evidence given to them by state officials could be admitted into federal court, regardless of how it had been obtained. The evidence was thus handed to federal agents on a "silver platter." The exclusionary rule was still not applied to the states, but the Court did hold that the exclusionary rule was the "only effectively available way" to deter law enforcement officials from violating the fourth amendment. *Id.* at 217.

The exclusionary rule was finally applied to the states the next year, in *Mapp* v. *Ohio*, 367 U.S. 643 (1961). There the Court held that it was "clos[ing] the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct." *Id.* at 654-55. The Court found that in so holding it ended the practice of federal agents "step[ping] across the street to the State's attorney with their unconstitutionally seized evidence." *Id.* at 658. The Court cited *Irvine* for the propsoition that "[t]he obvious futility of relegating the Fourth Amendment to the protection of other remedies has . . . been recognized by this Court since *Wolf*." *Id.* at 652-53.

The exclusionary rule has been highly criticized, both from within and without the United States Supreme Court. The justification for the rule is generally stated to be deterrence. *Stone* v. *Powell*, 428 U.S. 465, 486 (1976). Early cases also set out the preservation of "judicial integrity" as a justification for the rule, but this theory has been largely abandoned. *Id.* at 485. *See, United States* v. *Peltier*, 422 U.S. 531 (1975). The exclusionary rule is more or less unique to the United States among common law countries. *Bivens* v. *Six Un-*

known Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting). *See Kuruma v. The Queen*, [1955] A.C. 197. *See generally* "The Exclusionary Rule under Foreign Law," 52 J. Crim. L.C. & P.S. 271 (1961). Laymen generally view the exclusionary rule as a "technicality" that releases known criminals into society. *See* Wilkey. "The Exclusionary Rule: Why Suppress Valid Evidence?" 62 Judicature 214, 223 (1978). Evidence suppressed under the fourth amendment is not inherently unreliable, as are involuntary confessions, suppressed under the fifth amendment, and unduly suggestive line-ups, suppressed under the fifth and sixth amendments. *See*, Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. Of Chi. L. Rev. 665, 737-38 (1979). Additionally, the Court has consistently ruled that a criminal defendant may be forcibly abducted from another state or country and brought into jurisdiction to stand trial. *Frisbie* v. *Collins*, 342 U.S. 519 (1952). *Also see* Oaks, *supra*, at 669. By refusing to bring out the whole truth, critics have charged, the courts allow the truth to be completely distorted. "Undeniable facts, of the greatest importance, are forever barred. . . ." Wilkey, *supra*, at 222.

One of the more compelling criticisms leveled against the rule is that it does not accomplish the stated objective, *i.e.*, deterrence. In 1960, when some states were still operating without the exclusionary rule, the United States Supreme Court stated in *Elkins* v. *United States*, 364 U.S. 206 (1960), that "[e]mpirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained." *Id.* at 218. *See also*, *Irvine* v. *California*, 347 U.S. 128, 136 (1954), where the Court said, "There is no reliable evidence known to us that inhabitants of those states which exclude the evidence suffer less from lawless searches and seizures

than those of states that admit it." Chief Justice Burger further developed this idea in his dissenting opinion in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (Burger, C.J., dissenting). There he stated that the effect of the exclusionary rule on police conduct is lessened by the long time lapse between the original police action and the final judicial evaluation. The Chief Justice surmised that "[g]iven a policeman's pressing responsibilities, it would be surprising if he ever becomes aware of the final result after such a delay." 403 U.S. at 417. Additionally, Burger continued, "[T]he exclusionary rule's deterrent impact is diluted by the fact that there are large areas of police activity that do not result in criminal prosecutions." 403 U.S. at 417-18. There are several motivations that prompt arrests and searches and seizures by police other than criminal prosecution. These include

> [1] arrest or confiscation as a punitive sanction (common in gambling and liquor law violations), [2] arrest for the purpose of controlling prostitutes and transvestites, [3] arrest of an intoxicated person for his own safety, [4] search for the purpose of recovering stolen property, [5] arrest and search and seizure for the purpose of "keeping the lid on" in a high crime area or of satisfying public outcry for visible enforcement, [6] search for the purpose of removing weapons or contraband such as narcotics from circulation, and [7] search for weapons that might be used against the searching officer.

Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. of Chi. L. Rev. 665, 721-22 (1970). This multiplicity of goals for an arrest or a search and seizure is in sharp contrast to the limited number of reasons for line-ups and confessions, two other types of commonly excluded evidence. The predominant incentive for the latter two is to obtain evidence for use in court.

Oaks, *supra*, at 722. If the evidence is not to be used in court, the possibility of exclusion is a hollow threat.

Even worse than the lack of deterrence, however, is the conduct that the rule does promote among police officers. In a study conducted by Dallin Oaks pursuant to a grant from the National Institute of Law Enforcement and Criminal Justice of the United States Department of Justice, Professor Oaks concluded that "some experienced [police] officers will 'twist' the facts in order to prevent suppression of evidence and release of persons whom they know to be guilty." Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. of Chi. L. Rev. 665, 739-40 (1970). Oaks further stated that subsequent to *Mapp*, "the police were fabricating testimony in order to comply with arrest formalities and circumvent the exclusionary rule." *Id.* at 708.

A further criticism of the rule is that it fails to "provide effective and meaningful compensation to those citizens, particularly innocent victims of illegal searches and seizures." Wilkey, "The Exclusionary Rule: Why Suppress Evidence?" 62 Judicature 214, 228 (1978). The "compensation" provided for the victims of an illegal arrest or search and seizure is irrational in that "the guilty are over-rewarded by a commutation of all penalties for crimes they did commit and the innocent are never compensated for the injuries they suffered." Wilkey, *supra*, at 228. The policeman who engages in the unlawful conduct is rarely, if ever, subject to any type of personal sanction. *See, Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting); Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. of Chi. L. Rev. 665, 724 (1970). The immediate sanction that is triggered by the exclusionary rule is against the prosecutor, whose case against a criminal is either weakened or destroyed. The prosecutor, however, is not an official of the police department. The exclusionary rule is well tailored to deter the prosecutor from

illegal conduct. However, he is not the guilty party in an unlawful arrest or search and seizure, and he rarely, if ever, has control over those who are, the police. *See* 403 U.S. at 416, Oaks, *supra*, at 726.

Furthermore, the exclusionary rule "fails to discriminate between the degrees of culpability of the officer or the degree of harm to the victim of the illegal search and seizure." Wilkey, "The Exclusionary Rule: Why Suppress Valid Evidence?" 62 Judicature 214, 225-26 (1978). Regardless of whether there is a mere technical violation, such as a defective warrant, or a gross violation of the fourth amendment, such as was seen in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), the penalty is the same; the evidence is excluded. Wilkey, *supra*, at 226. In contrast, the judicial system customarily applies different standards to crimes that vary as to seriousness, such as in granting bail and in imposing sentence. *Id.* Additionally, even though "[i]nadvertent errors of judgment that do not work any grave injustice will inevitably occur under the pressure of police work," *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 418 (1971) (Burger, C.J., dissenting), these errors are, from a law enforcement standpoint, impossible to correct. Once the unlawful search or arrest is made, it is often difficult or impossible to convict the defendant involved, irrespective of his guilt. E. Griswold, *Search and Seizure: A Dilemma of the Supreme Court* 57 (1975). The courts make decisions as to the legality of arrests and searches and seizures "after full briefs and oral arguments, . . . with full deliberation within the court, and often with numerous and vigorous dissents." E. Griswold, *supra*, at 52. The same decisions must be made by police officers "usually in a moment or two, with no opportunity for deliberation and in the stress of immediate action." E. Griswold, *supra*, at 52.

The tenor of the criticism of the exclusionary rule was summed up by Wigmore when he stated that "the

two effects of the exclusionary rule are to produce a troublesome grist for the courts and to return rascals to the practice of their nefarious trades." 8 J. Wigmore, *Evidence in Trials at Common Law* (rev. by J. McNaughton) § 2184a at 52 (1961). More important than the outside criticism, however, is the criticism of the exclusionary rule by members of the United States Supreme Court. In the past five years, the members of the Court have, in their opinions, evidenced more and more restraint in the application of the rule.

This "backing off" process began as early as 1954. In that year, the Court decided the case of *Walder* v. *United States*, 347 U.S. 62 (1954). There it held that if a defendant asserts on direct examination that he has never seen or possessed evidence seized unlawfully (there, narcotics), the evidence may be admitted solely for purposes of impeachment. *Id.* at 64. The Court stated:

> It is one thing to say that the government cannot make an affirmative use of the evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.

Id. at 65.

In *Linkletter* v. *Walker*, 381 U.S. 618 (1965), the Court ruled that its decision in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), was not retroactive. In support of this conclusion, the Court stated that "the fairness of the trial is not under attack," 381 U.S. at 639, and that "the ruptured privacy of the victims' homes and effects cannot be restored." 381 U.S. at 637.

The Court recognized in *Terry* v. *Ohio*, 392 U.S. 1 (1968), that the exclusionary rule is an imperfect tool for controlling police misconduct. There it stated:

> Regardless of how effective the [exclusionary] rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal.

Id. at 14. *Terry* carved out an exception to the warrant requirement in the area of "stop and frisk," lowering the requirement in that situation from probable cause to "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* at 27.

Desist v. *United States*, 394 U.S. 244 (1969), continued the rationale of *Terry* when it refused to apply retroactively *Katz* v. *United States*, 389 U.S. 347 (1967), the case which defined the limits of fourth amendment protection in terms of reasonable expectation of privacy, 389 U.S. at 353. The Court stated that "we simply decline to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served." 394 U.S. at 254 n.24.

Chief Justice Burger's vigorous dissent in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), has previously been noted, but even the majority opinion in that case was not completely favorable to the exclusionary rule. The majority found it necessary to recognize a cause of action for damages by citizens subjected to unlawful searches and seizures against the officials who violated their fourth amendment rights. *Id.* at 397.

Michigan v. *Tucker*, 417 U.S. 433 (1974), was a case involving violation of fifth amendment rights. It was, however, highly critical of the exclusionary rule. The Court there stated:

> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot

> realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.

Id. at 446. The Court went on to say that "[w]here the official action was pursued in complete good faith . . . the deterrence rationale loses much of its force." *Id.* at 447.

The Court made an even stronger statement in *United States* v. *Peltier*, 422 U.S. 531 (1975). There it stated that "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* at 542. Peltier declined to apply retroactively the rule of *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), which requires a warrant for border searches made elsewhere than at established border crossings.

The Court found in *United States* v. *Ceccolini*, 435 U.S. 268 (1978), that the taint of an unlawful search and seizure is much easier to attenuate where the evidence discovered was the identity of a live witness who later testified at trial. "The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve," the Court stated. *Id.* at 279. Mr. Justice Rehnquist, writing for the Court, concluded that "the degree of free will exercised by the witness is not irrelevant in determining the extent to which the exclusionary rule will be advanced by its application." *Id.* at 276.

Even more compelling than the language cited from the foregoing cases, however, are the numerous exceptions to the exclusionary rule the Court has created over

the years. Although "a search conducted without a warrant issued upon probable cause is *per se* unreasonable," *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219 (1973), and "the burden is on those seeking [an] exemption [from the requirement] to show the need for it," *Chimel* v. *California*, 395 U.S. 752, 762 (1969), quoting *United States* v. *Jeffers*, 342 U.S. 48, 51 (1951), the Court has recognized that "[t]here are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with." *Johnson* v. *United States*, 333 U.S. 10, 14-15 (1948). These exceptions have multiplied over the years, and have seriously limited the scope of the warrant requirement and, *a priori*, the exclusionary rule.

The first exception to be recognized by the Supreme Court was the automobile exception. It held in 1925, in the case of *Carroll* v. *United States*, 267 U.S. 132 (1925), that a warrant to search an automobile could be dispensed with since "[b]efore a warrant could be secured the automobile would be beyond the reach of the officer." *Id.* at 146. The Court went on to say, however, that the officer carrying out the search must possess "a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction." *Id.* at 149. In other words, there must be probable cause for the search. This mandate has been required in all cases setting out exceptions to the warrant requirement. The automobile exception was further developed in *Chambers* v. *Maroney*, 399 U.S. 42 (1970). There the Court again focused on the mobility of the car, and held further that a car could be searched without a warrant even after the suspect-driver of the automobile had been arrested and the car had been driven to the police station. However, the Court limited the exception in the case of stationary cars in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), stating that "[t]he word 'automo-

bile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." 403 U.S. at 461-62. More recently, the Court has held that police may make a warrantless search of an automobile at the station house for the purpose of making an inventory of its contents. *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). The justification for this rule is threefold. First, the police have the responsibility of protecting the owner's property while it remains in police custody. Second, the police may conduct an inventory to protect themselves against claims or disputes over lost or stolen property. Third, an inventory will protect police and the public from potential hazards, such as bombs or other explosive devices. 428 U.S. at 369. An inventory may be made not only of cars driven by persons who have been arrested, but also of cars abandoned or towed away for parking violations. 428 U.S. at 368.

A second exception promulgated by the Court was the "evanescent evidence" exception. This exception applies to evidence that is either of short duration or highly destructible. *Schmerber* v. *California*, 384 U.S. 757 (1966), dealt with the suppression of a blood-test for the purpose of showing the percentage of alcohol in the defendant's blood. The Court recognized that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Id.* at 770. Because of the short duration of the existence of this type of evidence, and because of the length of time necessary to procure a warrant, the Court held that "the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest." *Id.* at 771. In *Cupp* v. *Murphy*, 412 U.S. 291 (1973), the Court extended this doctrine to searches and seizures of evanescent evidence that were not incident to arrests. There the police took fingernail scrapings from a suspect who was present at the police station but who was not under arrest. The validation of the search was premised on

"the existence of probable cause, the very limited intrusion undertaken incident to the station house detention, and the ready restructibility of the evidence." 412 U.S. at 296.

The Court set forth the so-called "hot pursuit" exception in *Warden* v. *Hayden*, 387 U.S. 294 (1967). There the Court upheld the search of a residence for "a suspected felon, armed, within the house into which he had run only minutes before the police arrived." *Id.* at 299. The scope of the search, the Court held, is "as broad as may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape." *Id.* The Court justified its holding on the ground that "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." *Id.* at 298-99.

A search warrant is not required when the party in control of the searched premises gives his consent to the search, *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973). The consent, however, must be "freely and voluntarily given," and the prosecution has the burden of proving voluntariness, *Bumper* v. *North Carolina*, 391 U.S. 543, 548 (1968). Consent given after a claim of authority to search by a police officer is not valid, since he has in effect told the occupant of the house that he has no right to resist the search. "Where there is coercion there cannot be consent." 391 U.S. at 550. However, "knowledge of a right to refuse is not a prerequisite of a voluntary consent." 412 U.S. at 234. Although consent may not be coerced, either explicitly or implicitly, "[v]oluntariness is a question of fact to be determined from all the circumstances." 412 U.S. at 248-49. While knowledge of the right to refuse consent to a search, or lack thereof, is a factor to be considered in assessing voluntariness, it is not determinative. 412 U.S. at 249.

The permissible limits of a search incident to arrest were set out by the Court in *Chimel* v. *California*, 395

U.S. 752 (1969), and *Chambers* v. *Maroney*, 399 U.S. 42 (1970). *Chimel* held that an arresting officer may search "the arrestee's person and the area 'within his immediate control.'" 395 U.S. at 763. The phrase "area within his immediate control" was construed to mean "the area from within which he might gain possession of a weapon or destructible evidence." 395 U.S. at 763. *Chambers*, however, limited that search to the time and place of the arrest, since "[o]nce an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." 399 U.S. at 47, quoting *Preston* v. *United States*, 376 U.S. 364, 367 (1964).

The "plain view" exception was developed by the Court in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). Basically, the police "may seize evidence in plain view without a warrant." *Id.* at 465. However, for the doctrine to apply, the police must be legitimately on the premises, by way of a warrant or one of the other recognized warrant exceptions, *id.* at 465, and the "discovery of evidence in plain view must be inadvertent." *Id.* at 469. "[P]lain view *alone* is never enough," *id.* at 468; it must be coupled with a warrant or with one of the other exceptions.

A final way in which the Supreme Court has limited the application of the exclusionary rule is by drawing strict standing requirements for defendants who challenge the admissibility of unlawfully seized evidence. At the time *Mapp* v. *Ohio*, 367 U.S. 643 (1961), was decided, standing was governed by the case of *Jones* v. *United States*, 362 U.S. 257 (1960). Under *Jones*, "anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." 362 U.S. at 267.

The broad standing requirements of Jones, however, were somewhat narrowed in *Alderman* v. *United States*, 394 U.S. 165 (1969). The Court held there that "sup-

pression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Id.* at 171-72. The Court recognized the exclusionary rule and reiterated its importance, but stated:

> [W]e are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

Id. at 174-75.

United States v. *Calandra*, 414 U.S. 338 (1974) followed *Alderman* very closely, while discussing the "balancing process" used in determining standing. The *Calandra* Court described the exclusionary rule as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Id.* at 348.

The most recent pronouncement by the Supreme Court on the subject of standing to challenge evidence seized in violation of the fourth amendment is found in *Rakas* v. *Illinois*, 439 U.S. 128 (1978). There the Court adopted the "reasonable expectation of privacy" test of *Katz* v. *United States*, 389 U.S. 347 (1967), in cases involving standing. The Court attempted to reconcile *Jones* v. *United States*, 362 U.S. 257 (1960), by stating:

> [T]he holding in *Jones* can best be explained by the fact that Jones had a legitimate expectation of privacy in the premises he was using and therefore could claim the protection of the Fourth Amendment with respect to a governmental invasion of those premises, even though his "interest" in those premises might not have been a recognized property interest at common law.

439 U.S. at 143. *Rakas* revealed an underlying dissatisfaction with the exclusionary rule by stating that "[e]ach time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected." 439 U.S. at 137. Since the Petitioner failed to show that, as a passenger, he had a legitimate expectation of privacy in the glove compartment of the car in which he was riding, he had no standing to challenge the admission of the evidence.

The requirements surrounding arrest warrants are more lenient than those concerning search warrants. Although the Supreme Court has expressed a preference for arrest warrants, *Beck* v. *Ohio*, 379 U.S. 89 (1964), the common law rule authorizing felony arrests on probable cause without a warrant remains the law. *United States* v. *Watson*, 423 U.S. 411 (1976). However, police may not make a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. *Payton* v. *New York*, 445 U.S. 573 (1980). Nevertheless, an unlawful arrest is not a defense to a criminal action. *Frisbie* v. *Collins*, 342 U.S. 519 (1952). The problem in most cases involving an illegal arrest, as is the problem in the present case, is that any search conducted incident to an unlawful arrest is invalidated, thus rendering inadmissible any evidence seized pursuant to the search. The same problems therefore, associated with unlawful searches and seizures are also relevant to arrests made on less than sufficient probable cause. Although a defendant may be guilty, the evidence that proves that fact cannot be used if he was arrested before a police officer's suspicions have hardened into probable cause.

The exclusionary rule is a crude, heavy-handed sanction of doubtful effectiveness. Although there is no doubt that there is a necessity for some sanction, it is now time to explore alternatives to the exclusionary rule.

Chief Justice Burger has suggested that "Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated." *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 422 (1971) (Burger, C.J., dissenting). The exclusionary rule is an impairment to the search for truth; it vastly overreaches its function as a disciplinary measure for police officers. A comparison between our system, with its exclusionary rule, and that of Great Britain, which does not have such a rule, fails to reveal in the British system any of the abuses warned against by proponents of the rule. "Abuse of power by the police is not thought to be a problem in England and . . . The reputation for excellent police work which the British have established and which others envy seem to the foreign observer to be well justified." E. Friesen & I. Scott, *English Criminal Justice: An Introduction for American Readers* 63-64 (1977) The English procedure consists of rigorous investigation of all complaints against the police, no matter how petty. E. Frien & I. Scott, *supra*, at 63. Confessions are evaluated merely on the basis of voluntariness; if voluntary they are admitted, otherwise they are excluded. The Royal Commission on Criminal Procedure, *Part II of the Written Evidence of the Commissioner of Police of the Metropolis* 145 (1978) [hereinafter cited as Royal Commission]. The standard of voluntariness is admittedly more stringent than the American standard, as evidenced in the case of *R. V. Partridge* [1836] 7 C. & P. 551, where in the statement "I should be obliged to you if you would tell us what you know about it; if you will not, of course, we can do nothing," was held to render a confession involuntary. However, evidence discovered as a result of an involuntary confession is admissible, since the involuntariness of a confession only goes to its reliabiilty. Royal Commission, *supra*, at 148.

To summarize, given the history of the development and application of the exclusionary rule as applied to the states, and its obvious failure to accomplish its stated purpose of deterring unlawful police conduct, we are simply not willing to extend the rule any further than is necessary to comply with decisions of the United States Supreme Court. Therefore, the decision of the Court of Criminal Appeals is reversed, and we remand this case to that court so that the verdict of the trial jury may be reinstated.

REVERSED AND REMANDED.

Maddox, Almon, Shores, and Beatty, JJ., concur.

Faulkner, Jones, and Embry, JJ., would quash the writ and, therefore, dissent.

Adams, J., (not sitting).

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

April 10, 1981

Re: 79-732

Ex. Parte: State of Alabama, Ex Rel. Attorney General

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Omar Taylor, Appellant vs. State of Alabama, Appellee)

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

———Appeal docketed. Future correspondence should refer to the above number.

———Court Reporter granted additional time to file reporter's transcript to and including

———Clerk/Register granted additional time to file clerk's record/record on appeal to and including

———Appell——— granted 7 additional days to file briefs to and including

———Appellant(s) granted 7 additional days to file reply briefs to and including

———Record on Appead filed

———Appendix Filed

———Submitted on Briefs

———Petition for Writ of Certiorari denied. No opinion.

xxxxx Application for rehearing overruled. No opinion written on rehearing.

———Permission to file amicus curiae briefs granted

———

4-10-81

/s/ J. O. Sentell
Clerk, Supreme Court of
Alabama

SUPREME COURT OF THE UNITED STATES

No. 81-5152

OMAR TAYLOR, PETITIONER

v.

ALABAMA

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF ALABAMA

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 2, 1981

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